Supreme Court, U.S.
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92-336

No. _____

THE UNITED STATES SUPREME COURT

October Term, 1992

Kimberly Letke,

Petitioner

v.

Constandeno Vlachos, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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53 pp

QUESTIONS PRESENTED FOR REVIEW

Were the actions of Baltimore County, Maryland Internal Affairs police officers, in detaining another officer in the Police Internal Affairs office because of her refusal to sign official police documents, actions performed under color of state law under 42 U.S.C. § 1983?

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

Officer Kimberly Letke - Plaintiff

Sergeant Constandeno Vlachos - Defendant

Corporal Brian Cwalina - Defendant

Detective Nelson Berryman - Defendant

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REFERENCE TO OFFICIAL AND UNOFFICIAL

REPORTS OF OPINIONS

Constandeno Vlachos, et al. v. Kimberly Letke, No. 1994, September Term, 1990, in the Court of Special Appeals of Maryland, Unreported Opinion filed February 14, 1992.

Kimberly Letke v. Constandeno Vlachos, et al., Petition Docket No. 50, September Term, 1992, in the Court of Appeals of Maryland, Certiorari denied, June 18, 1992.

STATEMENT OF GROUNDS FOR JURISDICTION OF THIS COURT

The Order of the Court of Appeals of Maryland denying the Petition for Writ of Certiorari to the Court of Special Appeals was decided on June 18, 1992.

No rehearing or extension of time to file this Writ had been sought.

Jurisdiction to review the judgment in question by Writ of Certiorari is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

42 U.S.C. § 1983

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Kimberly Letke v. Constandeno Vlachos, et al., case number 55/219/88CG1819 was tried before the Honorable Dana M. Levitz, a judge in the Circuit Court for Baltimore County, Maryland. Judgments in favor of the Plaintiff were entered on October 25, 1990 against the various Defendants for violation of the Plaintiff's civil rights under 42 U.S.C. § 1983 and related State counts. Damages totalling $6,000.00 were awarded. Following a request for attorney's fees and costs under 42 U.S.C. § 1988 on October 25, 1990 the Court ordered the payment of the sum of $3,793.65 to Plaintiff's counsel.

The Defendants filed a Notice of Appeal with the Court of Special Appeals of Maryland and Plaintiff filed a Cross-Appeal. The case was docketed as case number 1994, September Term, 1990. In the Brief filed by the Appellants (the Defendants below), the issue was raised that the actions of the Defendants were

not "under color of state law" and therefore the civil rights claims under 42 U.S.C. § 1983 must fail. That same issue had been raised by the Defendants at trial during argument on a Motion for Judgment and had been summarily rejected by the trial judge.

In the Opinion filed by the Court of Special Appeals of Maryland on February 14, 1992, the Court specifically considered the constitutional issue of "under color of state law" and found that the acts of the police officer Defendants were "neither acts that the police officers could commit because clothed with the authority of the State of Maryland nor were they within the sphere of acts with a purpose of carrying out their official responsibilities". (Opinion, page 9) Because the Court reasoned that the Defendants' conduct failed to comport with their official responsibilities, they reasoned that the Appellants' Motion for Judgment Notwithstanding the Verdict should have been granted.

A Motion for Reconsideration raising the same issue of "under color of state law" was denied by the Court of Special Appeals of Maryland on March 12, 1992.

On March 31, 1992 Kimberly Letke filed a Petition for Certiorari requesting the Court of Appeals of Maryland to review the decision of the Court of Special Appeals of Maryland. The sole issue raised in that Petition for Certiorari was whether the actions of the Defendants were performed under color of state law under 42 U.S.C. § 1983.

By Order dated June 18, 1992, the Court of Appeals of Maryland denied Certiorari.

The instant Petition for Writ of Certiorari is filed within ninety days of that decision.

The factual predicate for these decisions was as follows:

Kimberly Letke had joined the Baltimore County Police Department in 1980. (E. 71) Due to the job related stress and depression from 1985 and continuing through June 26, 1987, the

date of this incident, Kimberly Letke was under the care of Dr. Paul Clavelle, a Police Departmental Clinical Psychologist. (E. 76, 172, 174, 176) Indeed, on June 13, 1987, just thirteen days before this incident, Dr. Clavelle had placed Kimberly Letke on sick leave because her depression had reached such a point that she was having very clear suicidal ideation. (E. 129)

In early June, 1987, Dr. Clavelle received a call from Det. Nelson Berryman from the Office of Internal Affairs of the Baltimore County Police Department. (E. 201) Det. Berryman confirmed his knowledge that Kimberly Letke was on psychological sick leave. He asked Dr. Clavelle for permission to ask Ms. Letke to come to Internal Affairs to sign some forms regarding complaints that Ms. Letke had filed against her supervisor. (E. 202) Kimberly Letke and Dr. Clavelle subsequently discussed Det. Berryman's request, and given the very limited scope of the matter under consideration, agreed to a meeting

at Internal Affairs on June 26, 1992. (E. 181)

On June 26, 1992, Kimberly Letke arrived at Internal Affairs and signed a waiver of rights form since she was appearing voluntarily without compensation while off duty on sick leave and under the care of Dr. Clavelle. (E. 424) After a tape recorded interview lasting one-half hour regarding the complaint she had filed, she was informed of the need to sign some additional papers related to her complaint.

Upon completion of that paperwork, Kimberly Letke was approached on one side by Cpl. Brian Cwalina who asked her to sign another form, Form 259, which was acknowledgement of new charges being placed against her. (E. 140) Ms. Letke informed Cpl. Cwalina that no one had told her about these documents and that she would not sign any document until her attorney, Leslie L. Gladstone, had a chance to review them first. (E. 82)

Ms. Letke was then approached on her other side by Sgt. Constandeno Vlachos who told her

"we want you to sign these papers!" Ms. Letke repeated what she had just told Cpl. Cwalina. Sgt. Vlachos responded that he would order her to sign the papers and then he displayed his sergeant's badge to her. (E. 116-117)

Ms. Letke asked to use the telephone at the secretary's desk to call her attorney but this was refused. She then proceeded to a rear office and was there permitted to call her attorney. Her attorney, Mr. Gladstone, instructed her to give Sgt. Vlachos his name and address and request that the forms be mailed to him. (E. 86) Ms. Letke, upon completing the call, conveyed this information to Sgt. Vlachos and Det. Berryman. Despite this reasonable request, Sgt. Vlachos again told Ms. Letke that he could order her to sign Form 259. Ms. Letke once again stated that notwithstanding such an order, she still would not sign without her attorney reviewing it first. Sgt. Vlachos reannounced his superior rank over Ms. Letke and then ordered her to sign the papers. Ms. Letke

refused and told him she was going to leave the premises. (E. 87) Sgt. Vlachos informed Ms. Letke "You are not leaving until you sign this paper." (E. 88) Sgt. Vlachos' body was completely blocking the front door. When Ms. Letke attempted to leave by going around him, Sgt. Vlachos grabbed her and using his shoulder, pushed her into the wall, preventing her from leaving through the front door. (E. 89) When she then tried to leave by the back door, Det. Berryman, who was blocking the way out, told her, "Don't think you are going out the back door." (E. 208, 238-239)

Once again, Ms. Letke entered the rear office and telephoned her attorney. It was only after Mr. Gladstone spoke with the Lieutenant Supervisor at Internal Affairs was Ms. Letke permitted to leave the Internal Affairs office.

ARGUMENT

There are indeed special and important reasons for the granting of this Writ. The decision of the Court of Appeals of Maryland, a State Court of last resort, has resolved a Federal question defining "under color of state law" in a way that conflicts with the decisions of almost every other State Court of last resort, from the various United States Court of Appeals as well as from prior decisions of the United States Supreme Court. The rationale of the Maryland State Courts of Appeal is indeed so flawed in this regard as to require review and reversal.

To succeed under a claim of violation of 42 U.S.C. § 1983, the Plaintiff must show by a preponderance of the evidence that the Defendants' actions were performed under color of state law. Outz v. Maryland, 470 F.2d 790 (9th Cir. 1972), rehearing 505 F.2d 547, 426, U.S. 449, 95 S.Ct. 1681, 44 L.Ed.2d 103.

The Court of Special Appeals of Maryland

held that because the parties could not reasonably believe that Sgt. Vlachos and Det. Berryman could prevent Ms. Letke from leaving and their conduct failed to comport with their official responsibilities, Sgt. Vlachos and Det. Berryman's false imprisonment of Ms. Letke was not performed under color of state law.

This reasoning completely ignores the long list of cases that hold that police officers act under "color of law" when their deprivation of rights is committed in the fulfillment of the task and obligations assigned to them, or made possible by the power conferred upon them by the government. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), ovrld. on other grounds, Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1977).

Police officers' actions are still under "color of law" even if committed in excess of authority, with no authority or by misuse of their authority. Krier v. Amodio, 441 F.Supp.

181 (E.D. PA, 1977); Kedra v. Philadelphia, 454 F.Supp. 652 (E.D. PA, 1973); United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

The United States Supreme Court has said, "There can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in same capacity, whether they act in accordance with their authority or misuse it." (Emphasis added) Monroe v. Pape, 365 U.S. 167, 171-172 (1961). Even as far back as 1945, this Court recognized that under color of law meant under pretense of law. While it was recognized that actions of officers in the ambit of their personal pursuits were plainly excluded from the scope of § 1983, acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495

(1945). This Court added, "If, as suggested, the statute was designed to embrace only actions which the State in fact authorized, the words 'under color of state law' were hardly apt words to express this idea." Screws v. United States, 325 U.S. 91 at 111.

Clearly, Sgt. Vlachos and Det. Berryman were acting under color of state law when they prevented Ms. Letke from leaving before she signed Form 259. They asked her as police officers and in furtherance of police department duties to sign the form or not leave the building. Sgt. Vlachos even went so far as to remind her that he was a superior officer, displayed his badge and then ordered her as her superior officer to sign Form 259. It is irrelevant whether Sgt. Vlachos and Det. Berryman actually had the authority to prevent Ms. Letke from leaving. They were acting in furtherance of their duties as police officers and were therefore, acting under color of state law. See, Kedra v. Philadelphia, 454 F.Supp.

652, 665 (E.D. PA, 1973) ("Whether he is acting within the lawful scope of his authority is of little significance so long as his apparent authority flows from the State or his conduct is in some way related to the State.")

To permit the holding of the Maryland Appeal Courts to stand in this case would, in essence, prohibit any 42 U.S.C. § 1983 action where police officers, or any other officials for that matter, exceed their official authority. On the other hand, if they were within their authority, good faith immunity would apply. Accordingly, there would never (or rarely) be any sustainable 42 U.S.C. § 1983 violation - a "catch 22" situation.

Other jurisdictions faced with this issue have found that misuse of power possessed by virtue of State or local authorization, and made possible only because the wrongdoer is clothed with the authority of the State, is action take under "color of law." Geach v. Moynahan, 207 F.2d 714 (CA 7 Ill., 1953); Pritt v. Johnson,

264 F.Supp. 167 (M.D. PA, 1967); Roberts v. Trapnell, 213 F.Supp. 49 (E.D. PA, 1962); Thompson v. Baker, 133 F.Supp. 247 (D.C. Ark., 1955); Baldwin v. Morgan, 251 F.2d 780 (CA 5 Ala., 1958); Stringer v. Dilger, 313 F.2d 536 (CA 10 Colo., 1963); Henry v. Cagle, 482 F.2d 137 (CA 6 Tenn., 1973).

"Under color of law" has been found if the wrongdoer is clothed with the authority of the State and is purporting to act thereunder, even if the conduct is proscribed by State law. Marshall v. Sawyer, 301 F.2d 639 (CA 9 Nev., 1962); Love v. Navarro, 262 F.Supp. 520 (C.D. Cal., 1967)

Under the circumstances of this case, the actions of the police officer Defendants were clearly under color of law and the decision of the Maryland Courts to the contrary must be reversed.

Respectfully submitted,

Leslie L. Gladstone

APPENDIX

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Order of the Court of Appeals of Maryland filed 6/18/92. . . . . AP31

KIMBERLY LETKE	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
SGT. CONSTANDENO	*	BALTIMORE COUNTY
VLACHOS, et al.	*	
Defendants	*	88 CG 1819

* * * * * * * * * *

VERDICT SHEET

1. Do you find by a preponderance of the evidence that any of the Defendants acted with actual malice towards Miss Letke?

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes _____ No _____

(No decision)

C. Off. Cwalina Yes _____ No X

2. Do you find by a preponderance of the evidence that any of the Defendants acted with implied malice toward Miss Letke?

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes X No _____

C. Off. Cwalina Yes X No _____

3. Do you find by a preponderance of the

evidence any of the Defendants falsely imprisoned Miss Letke?

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes X No _____

C. Off. Cwalina Yes X No _____

4. Do you find by a preponderance of the evidence that Sergeant Vlachos battered Miss Letke?

Yes _____ No _____ (no decision)

5. Do you find by a preponderance of the evidence that any of the Defendants violated the constitutional rights of Miss Letke?

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes X No _____

C. Off. Cwalina Yes X No _____

6. Do you find by a preponderance of the evidence that any of the Defendants conspired to violate the constitutional rights of Miss Letke?

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes X No _____

C. Off. Cwalina Yes X No _____

KIMBERLY LETKE	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
SGT. CONSTANDENO	*	BALTIMORE COUNTY
VLACHOS, et al.	*	
Defendants	*	88 CG 1819

* * * * * * * * * *

VERDICT SHEET

1. What, if any, compensatory damages do you find, by a preponderance of the evidence, should be awarded to Kimberly Letke from:

A. Sgt. Vlachos $3,500.00

B. Det. Berryman $ 500.00

C. Off. Cwalina $1,000.00 $5,000.00

2. Do you find by a preponderance of the evidence that punitive damages should be awarded against:

A. Sgt. Vlachos Yes X No _____

B. Det. Berryman Yes _____ No X

C. Off. Cwalina Yes _____ No X

3. Punitive Damages

A. Vlachos $1,000.00

DOCKET SHEET (Case No. 55/219/88CG1819)

Sept. 27, 1990. Judgments entered in favor of the Plaintiff and against the Defendant (Sgt. Vlachos) for $3,500.00 as to compensatory damages and $1,000.00 as to punitive damages, and Defendant (Detective Berryman) for $500.00 as to compensatory damages, and Defendant (Officer Cwalina) for $1,000.00 as to compensatory damages, Court costs to be divided equally among the Defendants.

(31) Oct. 2, 1990 - Defts' Motion for New Trial, or in the alternative, motion for judgment notwithstanding the verdict with exhibit, fd.

Oct. 25, 1990 Hon. Dana M. Levitz. Hearing had in re Deft's Motion for New Trial or in the alternative, motion for judgment notwithstanding the verdict (P#31) - Denied. Defendant's Motion for N.O.V. Granted as to Punitive Damages against Sgt. Vlachos, Denied as to the balance of counts and compensatory damages. Plaintiff's Motion to allow Attorney's Fees and Costs -

Granted.

Oct. 25, 1990 Judgment entered in favor of Leslie Gladstone and against all the Defendants for the sum of $3,793.65.

Oct. 25, 1990 Judgment entered. (Indexed 10/26/90)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1994

September Term, 1990

CONSTANDENO VLACHOS ET AL.

V.

KIMBERLY LETKE

Garrity,

Fischer,

Cathell,

JJ.

Per Curiam

Filed: February 14, 1992

AP6

This matter involves a suit brought by a Baltimore County police officer against three of her fellow employees. The suit progressed on theories of assault and battery, false imprisonment, and violation of her civil rights.

BACKGROUND

Following in her father's footsteps, the appellee, Kimberly Letke, entered the Baltimore County Police Department as a cadet at eighteen years-of-age, directly after her graduation from high school in 1980. After working as an undercover narcotics agent for one and one-half years, she eventually assumed regular duties and was assigned to the Garrison District. Her personality was that of an extrovert and, according to testimony, she became quite outspoken in her ideas as to how law enforcement should be most productively accomplished. As a result of this trait, she soon felt resentment from other officers, as well as a sense of alienation from them. The resultant stress prompted her, in 1985, to seek the counsel of

the department's clinical psychologist, Dr. Paul Clavelle.

Although Officer Letke's working relationship with other officers improved somewhat until early 1987, her situation worsened in June of that year due to her perception of being treated unfairly. According to Dr. Clavelle, who was then seeing her on a weekly basis, her feelings of anger, hopelessness, and depression became so intense that she began having suicidal ideation and contemplated shooting herself. On June 19, 1987, Dr. Clavelle placed Officer Letke on sick leave due to her depression.

It was against this back drop of information that Dr. Clavelle received a call from Det. Nelson Berryman from the Office of Internal Affairs. The Internal Affairs investigator knew that Officer Letke was on sick leave but asked him to allow her to visit the Internal Affairs office to sign forms regarding harassment complaints that she had filed against

her supervisors.

On June 26, 1987, Detective Berryman and Officer Foxwell interviewed Officer Letke in relation to her complaints. After signing the charging papers at the secretary's desk, Corporal Brian Cwalina approached and asked her to sign Form 259, which was an acknowledgement of notice of charges having been placed against her for violating police rules on outside employment, use of departmental equipment, and release of criminal records without proper authorization. Officer Letke immediately advised Corporal Cwalina that she did not know she would be served that day with charges and that she wanted her attorney to review the document before she signed it. Sergeant Constandeno Vlachos then approached Officer Letke and said, "We want you to sign these papers." She refused and reiterated that she wanted her attorney to review them first and advised the Sergeant that he could telephone her attorney or forward the form to him. When

Officer Letke attempted to use the telephone on the secretary's desk, she was refused its use. She then walked to a rear office and used a phone to call her attorney. On her attorney's instructions, she advised Cwalina and Vlachos that they should mail the form to her attorney and set up an appointment with him.

According to Officer Letke, Sergeant Vlachos then ordered her to sign Form 259. She refused and told the sergeant she was going to leave. He advised her, however, that "You are not leaving until you sign the form." Officer Letke started to walk down a narrow hallway toward the front door. Corporal Cwalina was standing on her left and Sergeant Vlachos was facing her with his left shoulder leaning against a hallway wall and his right outstretched arm and hand resting upon the opposite hallway wall. When Officer Letke attempted to walk past Sergeant Vlachos, he grabbed her upper arm and thrust his shoulder into her shoulder, shoving her against a door

frame. She immediately reversed direction and headed toward the back door. Detective Berryman, who was standing by the back door, then said, "You are not going out the back door." Officer Letke called her attorney again from the rear office and her attorney spoke with Lieutenant Przybylski who resolved the situation so that she could sign the form at a later date.

On April 29, 1988, Officer Kimberly Letke brought a civil rights suit and a state tort action against Sergeant Vlachos, Corporal Cwalina, and Detective Berryman. Her complaint alleged that the officers played a role in temporarily preventing her from leaving the police station. Appellee plead five separate counts in her complaint. Count I alleged false imprisonment by the three policemen. Count II was for battery by Sergeant Vlachos. Count III alleged that the three policemen violated her civil rights, and Count IV alleged a conspiracy to violate her civil rights. Count V alleged that the policemen were carrying out the policy

and practices of the Baltimore County Police Department and sought damages under 42 U.S.C. § 1983 against the police and county. She also sought attorney fees under section 1983.

The appellants filed a motion to dismiss the complaint on the basis of public official immunity, governmental immunity, and qualified immunity under 42 U.S.C. sec. 1983. The Circuit Court for Baltimore County (Hennegan, J.) ruled on the motion as follows:

> (1) Baltimore County and the County Police were dismissed from the case with prejudice.
>
> (2) Corporal Cwalina was dismissed as to Count I - false imprisonment - with prejudice.
>
> (3) Counts III and IV were dismissed as to the three policemen, with leave to amend.

Officer Letke filed amended Counts III and IV, and on September 18, 1990, a jury trial was held in the Circuit Court for Baltimore County

(Levitz, J.). The jury answered a special verdict form as shown below.

VERDICT SHEET

1. Do you find by a preponderance of the evidence that any of the Defendants acted with actual malice towards Miss Letke?

A. Sgt. Vlachos Yes __X__ No _____

B. Det. Berryman Yes _____ No _____

no decision

C. Off. Cwalina Yes _____ No __X__

2. Do you find by a preponderance of the evidence that any of the Defendants acted with implied malice toward Miss Letke?

A. Sgt. Vlachos Yes __X__ No _____

B. Det. Berryman Yes __X__ No _____

C. Off. Cwalina Yes __X__ No _____

3. Do you find by a preponderance of the evidence any of the Defendants falsely imprisoned Miss Letke?

A. Sgt. Vlachos Yes __X__ No _____

B. Det. Berryman Yes __X__ No _____

C. Off. Cwalina Yes __X__ No _____

4. Do you find by a preponderance of the evidence that Sergeant Vlachos battered Miss Letke?

Yes _____ No _____ no decision

5. Do you find by a preponderance of the evidence that any of the Defendants violated the constitutional rights of Miss Letke?

A. Sgt. Vlachos Yes __X__ No _____

B. Det. Berryman Yes __X__ No _____

C. Off. Cwalina Yes __X__ No _____

6. Do you find by a preponderance of the evidence that any of the Defendants conspired to violate the constitutional rights of Miss Letke?

A. Sgt. Vlachos Yes __X__ No _____

B. Det. Berryman Yes __X__ No _____

C. Off. Cwalina Yes __X__ No _____

After the jury reached their partial verdict on liability, the parties agreed that the battery count against Sergeant Vlachos and the false imprisonment count against Detective Berryman and Corporal Cwalina would be dismissed. The following week, the jury

returned to deliberate solely on damages and made the following award: $3,500 compensatory damages and $1,000 in punitive damages against Sergeant Vlachos; $500 compensatory damages against Detective Berryman; and $1,000 compensatory damages against Corporal Cwalina.

The defense motioned for a new trial or, in the alternative, for judgment notwithstanding the verdict (J.N.O.V.). On October 25, 1990, the trial judge denied the motion for new trial, granted the J.N.O.V. as to punitive damages against Sergeant Vlachos, and denied the J.N.O.V. motion as to compensatory damages against Vlachos, Berryman, and Cwalina. The trial judge also entered judgment for Officer Letke in the amount of $3,793.65 for attorney fees and costs pursuant to 42 U.S.C. § 1988.

In addition to deciding whether the trial judge erred in his formulation of the verdict form and jury instructions, we are asked by the appellants to decide: (1) whether the actions by the police officers entailed state action

under color of state law; and (2) whether the policemen enjoyed public official immunity or qualified immunity under 42 U.S.C. § 1983. We are asked by the appellee/cross-appellant whether the trial court erred in granting J.N.O.V. on the jury's finding of punitive damages against Sergeant Vlachos, and whether the court erred in reducing the claim for attorney's fees.

DISCUSSION OF LAW

I. Conduct Under Color of State Law, 42 U.S.C. § 1983

A. False Imprisonment

The alleged acts under color of state law that violated Officer Letke's constitutional rights were based on Sergeant Vlachos' and Detective Berryman's physical conduct in attempting to convince Officer Letke that she could not leave until she signed Form 259. Generally an alleged battery and false imprisonment by law enforcement officers is a claim which is cognizable under 42 U.S.C. §

1983. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973). Cf. Patterson v. Leeke, 529 F.2d 516 (4th Cir. 1976). Appellee does not appeal the circuit court's ruling that the police did not act in their official capacity to carry out a state policy; that is, she does not quarrel with the dismissal of the county and police department as defendants. The actionable amended complaint was brought against the police officers in their individual capacities for acts committed while carrying out their official duties (official actions). See generally, Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); see also, Hughes v. Blakenship, 672 F.2d 403, 406 (4th Cir. 1982).

We now analyze whether the trial court erred in not granting appellants' motion J.N.O.V. based on a lack of state action under color of state law. A motion J.N.O.V. must be granted where there is no rational ground upon which a verdict can be based for the plaintiff.

Cluster v. Cole, 21 Md. App. 242 (1974); see also, Domeski v. Atlantic Refining Co., 202 Md. 562, 567 (1953). Appellee had the burden of proving by a preponderance of the evidence that her fellow police officers acted under color of state law and deprived her of a right which is actually protected by the constitution. Outz v. Maryland Nat. Ins. Co., 470 F.2d 790 (9th Cir. 1972), rehearing 505 F.2d 547, cert. denied 95 S.Ct. 1681, 421 U.S. 449, 44 L.Ed.2d 103; See also, Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). In passing upon a motion J.N.O.V., the evidence and all logical and reasonable inferences deductible therefrom, must be considered in a light most favorable to the plaintiff's cause of action. Campbell v. Patton, 227 Md. 125 (1961).

In determining whether Sergeant Vlachos and Detective Berryman stepped outside the bounds of the "color of law" in their use of power made possible only because they were clothed with the authority of state law, we shall analyze whether

the evidence showed that the parties reasonably believed the policemen had authority to prevent Officer Letke from leaving. We first note that there was no testimony that Corporal Cwalina, verbally or otherwise, attempted to limit Officer Letke's movements.

Sergeant Vlachos ordered Officer Letke to sign a document. Officer Letke, however, was not on duty at the time of the incident, and, after consulting with her attorney, she could not have reasonably believed that state law compelled her to do so or not. In fact she asked the Sergeant after talking to her attorney: "[y]ou can order me all you want. I am not signing anything without my attorney looking at it first." She then said after Sergeant Vlachos ordered her to sign: "I am going to leave." Based on the advice of her attorney and her training as a police officer, she could not have reasonably believed that either Sergeant Vlachos or Detective Berryman had police authority to either arrest or detain

her against her will for failure to sign the form or for attempting to exit the police building. Indeed, Sergeant Vlachos testified that he knew he had no state authority to physically block her exit. Thus, the parties could not have reasonably believed that blocking Officer Letke's exit was within the scope of Sergeant Vlachos and Detective Berryman's authority under color of state law.

When Sergeant Vlachos grabbed Officer Letke's upper arm, he went far beyond any official purpose of giving Officer Letke notice that disciplinary charges were pending against her. Similarly, Detective Berryman's statement, "You are not going out the back door," had no purpose in giving Officer Letke notice of the disciplinary charges. In sum, it is clear that the attempts to block Officer Letke's exit were neither acts that the police officers could only commit because clothed with the authority of the State of Maryland nor were they within the sphere of acts with a purpose of carrying out

their official responsibilities. We hold that the trial court erred in not determining that Vlachos' and Berryman's conduct failed to comport with their official responsibilities. Thus, we conclude that the appellants' Motion J.N.O.V. as to the claims brought under 42 U.S.C. § 1983, should have been granted.

B. Conspiracy to Falsely Imprison

Amended Count IV, captioned "Conspiracy to Violate 42 U.S.C. Sec. 1983," stated that the appellants "did conspire to falsely imprison the [appellee] and to otherwise deprive her of her constitutional rights of movement." An action for conspiracy can be maintained under section 1983. Seliner v. Panagoulis, 565 F.Supp. 238 (D.Md. 1982), aff'd 796 F.2d 474, cert. denied, 479 U.S. 1069. The policemen, however, must have acted under color of state law in connection with any conspiratorial deprivation of constitutional rights. Id. at 249. Having held that the conduct by the appellants to attempt to convince Officer Letke that she could

not leave did not fall under "color of state law," we hold, on the same rationale, that the conspiratorial acts of her fellow employees did not fall under color of state law. Thus, we believe that the trial court also erred in not granting appellants' Motion J.N.O.V. as to the section 1983 conspiracy count. Having held that it was error to not grant the J.N.O.V. motion on the section 1983 counts, we hold it was also error to award attorney fees under section 1988 for prosecuting the section 1983 claim. We need not reach a determination of whether qualified immunity under 42 U.S.C. § 1983 existed.

II. State Law Claim (False Imprisonment)

We now address the remaining false imprisonment count. We note that the record shows that Corporal Cwalina was dismissed from the suit with prejudice on the false imprisonment count prior to the jury trial and we hold under the principle of res judicata that the judgment against him cannot stand. Further, the parties agreed that the false imprisonment

counts were dismissed against Corporal Cwalina and Detective Berryman.

Appellant Vlachos argues that the trial judge erred in his formulation of the verdict sheets and jury instructions. The jury found actual malice, implied malice, and false imprisonment on the part of Sergeant Vlachos. The trial judge, in ruling on the motion J.N.O.V., held that there was insufficient evidence for a reasonable fact finder to have found actual malice on the part of Sergeant Vlachos. The trial court's instructions to the jury on the elements of false imprisonment, however, did not include actual malice or implied malice as a relevant element to the determination of whether intent existed for false imprisonment. Though intent is a necessary element of false imprisonment, malice or evil intention is not. Safeway Stores, Inc. v. Barrack, 210 Md. 168 (1956); Majors v. U.S. Air, Inc., 525 F.Supp. 853 (D.Md. 1981).

The trial judge correctly instructed the

jury on the elements of false imprisonment. Appellee was entitled to have her theory of the case presented to the jury if it was a correct exposition of the law and there was testimony which supported it. Sergeant Co. v. Picket, 285 Md. 186, 199 (1979); Edwards v. Murphy, 83 Md. App. 133 (1990). The question posed to the jury on whether the defendant Vlachos falsely imprisoned Officer Letke was straightforward and correct. We hold that the trial court did not err in its jury instructions or in its formulation of the jury verdict form on the question of false imprisonment.

This leads us to the remaining issue of whether public official immunity protected Sergeant Vlachos on the false imprisonment claim. This court has defined the elements of public official immunity as follows:

> "A public servant is entitled to public official immunity if: (1) the public servant is a public official; (2) the alleged culpable conduct was committed by the official while acting in a discretionary capacity; and (3) the official acted without

actual malice."

Behan v. Gagliano, 84 Md. App. 719 (1990) (citing Leese v. Baltimore County, 64 Md. App. 442, 479 (1985)). The basis of the immunity of public officials from tort liability is that a public purpose is served by according protection to the exercise of official discretion. Arlington v. Moore, 31 Md. App. 448, 464 (1975). It can hardly be said that falsely imprisoning his fellow police officer, outside the purpose of giving her notice of the disciplinary charges filed against her, fell within Sergeant Vlachos' official duties. For the reasons discussed in Part I, we hold that Sergeant Vlachos' culpable conduct was committed while acting outside an official discretionary capacity and that he was not protected by public official immunity.

There remains the issue of whether the trial court erred in its formulation of the damages verdict sheet. Submission of special verdict form was within the sound discretion of the trial court. Campfield v. Crowther, 252 Md.

at 95. Appellants argued that there is no way of knowing whether the jury awarded the entire $3,500 against Sergeant Vlachos for false imprisonment or awarded some part for violation of Letke's civil rights because the damages verdict form asked for only one amount for compensatory damages as to each policeman. The judge instructed the jury, "[i]n determining compensatory damages you shall consider any mental pain and suffering, fright, nervousness, indignity, humiliation, embarrassment and insult to which the Plaintiff was subjected and which was a direct result of a Defendant's conduct." Whether under a federal or state tort claim, the compensatory damages remedy had the purpose of only making Officer Letke whole. Thus, we do not assume the jury increased the compensatory damages award merely because there was more than one theory of recovery. We hold that the trial court did not abuse its discretion in allowing the jury to determine compensatory damages as one amount under either a federal or state law

theory of liability.

The final issue on appeal is whether the trial court abused its discretion in granting the motion J.N.O.V. as to $1,000 in punitive damages against Sergeant Vlachos. Punitive damages may be recovered where there is actual malice or where malice may be implied from wantonness. Montgomery Ward & Co. v. Piskor, 281 Md. 627 (1975). The trial judge did find, in granting J.N.O.V. as to punitive damages against Sergeant Vlachos, that, "the most one can find is implied malice . . . I don't believe there was sufficient evidence for any reasonable fact finder to have found actual malice in this case on the part of Sergeant Vlachos." Thus, the trial court agreed with the jury that there was sufficient evidence to find implied malice by Sergeant Vlachos. This finding was sufficient to support the jury's punitive damage award of $1,000. We hold that the trial court erred in granting the motion J.N.O.V. as to punitive damages against Sergeant Vlachos.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART;

DENIAL OF J.N.O.V. AS TO COUNTS III AND IV REVERSED;

JUDGMENT AFFIRMED AS TO VLACHOS (COUNT I, FALSE IMPRISONMENT);

J.N.O.V. AS TO PUNITIVE DAMAGES AWARD REVERSED AND VERDICT REINSTATED AS TO VLACHOS;

AWARD OF ATTORNEY FEES UNDER 42 U.S.C. § 1983 REVERSED;

APPELLANT TO PAY TWO-THIRDS OF COSTS;

APPELLEE TO PAY ONE-THIRD OF COSTS.

COURT OF SPECIAL APPEALS

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March 19, 1992

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AP29

Re: Constandeno Vlachos et al. vs. Kimberly Letke

No. 1994, September Term, 1990

Dear Counsel:

Be advised that by Order of this Court entered on March 12, 1992, the Motion for Reconsideration of the per curiam opinion filed on February 14, 1992 which was filed on behalf of the appellee was denied. By Order entered on March 16, 1992, the Motion for Reconsideration filed on behalf of the appellants was also denied. The mandate of the Court, which issued today, is enclosed.

Very truly yours,

/s/

Leslie D. Gradet,

Clerk

LDG:ls

Enclosure

KIMBERLY LETKE	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	
	*	Petition Docket No. 50
	*	September Term, 1992
CONSTANDENO VLACHOS, et al.	*	(No. 1994, September Term, 1990, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and cross-petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and cross-petition, be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: June 18, 1992